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October 15, 2004

BY FACSIMILE

The Honorable Benjamin H. Grumbles
Acting Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Mr. Grumbles:

This letter follows up on the October 6, 2004 hearing of the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, entitled "Current Challenges in Combating the West Nile Virus." As discussed during the hearing, I am enclosing questions to be completed for the record.

Please send your response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building by November 6, 2004. If you have any questions about this request, please call Counsel Danielle Hallcom Quist at 226-2067. Thank you for your attention to this request.

Sincerely,



Doug Ose
Chairman

Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

Enclosure

cc The Honorable Tom Davis
The Honorable John Tierney

Q1. Citizen Lawsuits. On July 11, 2003, the Environmental Protection Agency (EPA) issued an “Interim Statement of Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA.” Notwithstanding this nonregulatory, nonbinding guidance document, local vector control districts still face the threat of lawsuits under the Clean Water Act (CWA).

- (a) What actions will EPA take to lessen the threat of citizen lawsuits under the CWA?
- (b) In light of the pending litigation in Gem County, Idaho, what steps can local vector control districts take to protect themselves from citizen lawsuits?
- (c) Since EPA’s guidance is not binding on non-Federal entities, in States where EPA administers the National Pollutant Discharge Elimination System (NPDES) permit program, will EPA issue an NPDES permit upon request in order to protect vector control districts from potential lawsuits under the CWA? If not, why not?

Q2. Final Guidance. EPA issued its interim guidance for public comment in the Federal Register on August 13, 2003 (68 FR 48385). Public comments were due on October 14th, i.e., a year ago.

- (a) Does EPA intend to finalize its interim guidance? If so, when?
- (b) If so, will the final guidance mirror the interim guidance?
- (c) If not, what are the expected substantive changes?

Q3. Formal Rulemaking. Under the Congressional Review Act, all agency documents, including guidance documents, with any general applicability or legal effect are subject to Congressional review before they can be issued or take effect. Therefore, EPA’s interim guidance is merely advisory for non-Federal parties. As a consequence, during the Subcommittee’s October 6, 2004 hearing, I asked you whether EPA would initiate a rulemaking to clarify under what circumstances vector control districts do or do not need to obtain a NPDES permit for use of both aquatic and aerial spray pesticides to control mosquitoes. You responded, “perhaps.” Please explain the following:

- (a) In 2003, why did EPA initially issue interim nonbinding guidance in lieu of an interim rule?
- (b) In 2003, why did EPA believe that nonbinding guidance was more appropriate than a formal rule with general applicability and legal effect under the Administrative Procedure Act?

- (c) On what date will EPA make a decision on whether to promulgate a rule?
- Q4. Wetlands. In the West, wetlands, both healthy and degraded, often provide prime habitat for mosquitoes infected with the West Nile Virus (WNV).
- (a) In light of the Bush Administration's policy of "no net-loss of wetlands," how does EPA intend to assist local vector control districts and public health officials in minimizing the public health threat posed by wetlands, especially wetlands located adjacent to suburban and rural populations?
- (b) How does EPA suggest local vector control districts manage vernal pools and other bodies of water considered to be under the jurisdiction of the CWA?
- Q5. Pesticide Availability. Vector control districts voice concern over the limited number of lower risk larvicides and adulticides available to control mosquitoes carrying the WNV. What steps has EPA taken to support the development of new and reduced risk public health pesticides?